UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SENDO LIMITED, SENDO INTERNATIONAL LIMITED, SENDO HOLDINGS PLC, and SENDO AMERICA, INC.,	:	
	:	Civil Action No. 5:02CV282 (DF)
Plaintiffs,	:	
	:	Jury Trial Demanded
v.	:	
	:	Judge Folsom
MICROSOFT CORPORATION, MICROSOFT LICENSING, INCORPORATED and MICROSOFT CAPITAL CORPORATION,	:	
Defendants.	:	

DEFENDANTS' MOTION TO TRANSFER VENUE
PURSUANT TO 28 U.S.C. § 1404(a)

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I. INTRODUCTION

Defendants hereby move under 28 U.S.C. § 1404(a) to transfer this case to the United States District Court for the Western District of Washington. Plaintiffs – United Kingdom companies[1] – agreed in advance to a forum selection clause setting exclusive jurisdiction and venue in the Western District of Washington, where Microsoft Corporation's headquarters are located. Plaintiffs have failed to allege any facts connecting this dispute to the Eastern District of Texas. The parties' agreement to set venue exclusively in another judicial district "figures centrally in the district court's calculus" under section 1404(a), *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988), and the remaining section 1404(a) factors – including the location of witnesses and documents and the contractual choice of Washington substantive law – also require transfer.

Even if there were no forum selection clause, there would be little deference due these foreign plaintiffs' choice to bring this case in the Eastern District of Texas. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) ("much less reasonable" to assume convenience of district in which plaintiff has sued when plaintiff is foreign); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992) ("When a plaintiff chooses a foreign forum for its claims, courts are reluctant to assume that convenience motivated that choice.") (citing *Piper*). With a contractual agreement to sue in Washington, and no factual nexus to this district, there can be little doubt that this case is ripe for transfer. The Court should transfer venue to the parties' agreed Washington forum.

[1] Sendo Ltd. and Sendo Holdings PLC are both incorporated in the United Kingdom; Sendo International Ltd. is deemed to be a "citizen" of the United Kingdom although it is incorporated in the Cayman Islands and registered in Hong Kong. (Complaint at ¶ 2.) A U.S. subsidiary, Sendo America, Inc., has also been joined but as explained *infra*, it is located in the *Northern* – not the Eastern – District of Texas and plaintiffs allege nothing about to link this dispute to this judicial district.

II. PROCEDURAL HISTORY AND FACTS

A. Procedural History

Plaintiffs allege that Microsoft Corporation ("Microsoft") contracted to help develop a cellular telephone called the "Z100 Smartphone," and to "go to market" with some of the Sendo companies when the Z100 was completed. Plaintiffs claim that Microsoft reneged on its obligations and improperly used certain confidential information of plaintiffs. (*See* Complaint ¶¶ 12-49.) Plaintiffs allege twelve counts,[2] and seek damages, defendants' alleged profits, costs, interest, attorney's fees and exemplary damages.

B. The Parties Agreed That Washington Is The Exclusive Forum For This Case.

1. The Principal Contract Sets Exclusive Jurisdiction In Washington.

The principal contract at issue in this case is the Strategic Development and Marketing Agreement (the "SDMA") to which Microsoft, Sendo Ltd. and Sendo International Ltd. are signatories. (*See* Declaration of Consuelo H. Poth ("Poth Decl."), Ex. B.) The SDMA, dated October 26, 2000, sets forth the duties relating to the parties' objective to "(i) have Sendo develop Sendo Smartphone(s) based on the Microsoft Smartphone Platform; (ii) cooperate on marketing and promoting the Sendo Smartphone(s) . . ., and (iii) cooperate on efforts to encourage wireless network operators to private label such Sendo Smartphone(s), all in accordance with the terms and conditions of this Agreement." (Poth Decl., Ex. B, Recital C.) Although the parties entered into some secondary agreements to implement specific obligations, the SDMA structured the overall relationship and objectives, and is plainly the contract most closely tied to the Complaint's central allegation – that Microsoft made "false promises" relating to its participation in the Z100 project. (Complaint at ¶¶ 15, 20.)

For example, plaintiffs allege that the SDMA:

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[2] Plaintiffs allege claims for misappropriation of trade secrets, common law misappropriation, conversion, unfair competition, fraud, breach of fiduciary duty, negligent misrepresentation, civil conspiracy, breach of contract,

> provided, in part, that (1) the Sendo Z100 Smartphone would be a market leading product; (2) Microsoft would prioritize the Sendo Z100 Smartphone; (3) Microsoft would pay an amount of money plus a contribution to expenses towards development of the Z100; and (4) Microsoft would receive a substantial percentage share of the Net Revenue from the sales of the Z100 as it had contributed to the development cost.

(Complaint at ¶ 21.)[3] Plaintiffs further allege that a prototype Z100 Smartphone was unveiled when "Sendo and Microsoft jointly announced the execution of *the SDMA*," that plaintiffs completed "milestones" under *the SDMA*, and that Microsoft repeatedly failed to abide by the terms of *the SDMA*. (Complaint ¶¶ 22, 21, 24, 30, 23-25 (emphasis added).)

By its own terms, the SDMA was the master agreement for the Z100 project. Its first page provides that, "[a]s part of the overall strategic relationship between the Parties," additional, secondary agreements would be created to implement specific activities outlined under the SDMA such as financing or software licensing. (Poth Decl., Ex. B at Recital D; *see also* Complaint at ¶¶ 21, 23.) Crucially, the SDMA contains an unambiguous choice of law and forum selection clause:

> This Agreement shall be construed and controlled by the laws of the State of Washington, and Sendo further consents to *exclusive jurisdiction and venue in the federal courts sitting in King County, Washington,* unless no federal subject matter jurisdiction exists, in which case Sendo consents to exclusive jurisdiction and venue in the Superior Court of King County, Washington.

(Poth Decl., Ex. B at ¶ 14.1) (emphasis added). Nothing alleged in the complaint, nor anything plaintiffs can assert in response, can detract from the clear expression of the parties' advance agreement to litigate this dispute in the Western District of Washington under Washington law.

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tortious interference with existing and prospective business relations, constructive fraud, and fraudulent inducement.

[3] In addition to Microsoft, plaintiffs have sued two Microsoft subsidiaries that executed contracts with Sendo in furtherance of the strategic development and marketing initiative governed by the SDMA – (1) Microsoft Licensing, Inc., which was involved in licensing certain Microsoft software to Sendo, and (2) Microsoft Capital Corporation, which loaned Sendo money to develop the Z100 Smartphone. (See Poth Decl., Ex. C and Ex. F; Brown Decl. at ¶ 4.)

2. A Washington Forum Is Consistent With The Secondary Contracts.

The SDMA contemplated "separate agreements" to implement discrete parts of the Z100 project, namely licensing of software and a Microsoft investment in Sendo. (Poth Decl., Ex. B at Recital D.) Licensing was implemented by two agreements, both of which provide for an exclusive Washington forum in virtually the same terms as the SDMA.[4] Microsoft's loan to Sendo was implemented by an agreement with a permissive Washington forum selection clause,[5] which "provides a clear indication of the parties' expectations and is entitled to consideration in a *forum non conveniens* analysis." *Neo Sack, Ltd. v. Vinmar Impex, Inc.*, 810 F. Supp. 829, 833 (S.D. Tex. 1993) (citing *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 51-53 (1st Cir. 1990)).

Plaintiff alleges a breach of two other contracts between the parties. One, a non-disclosure agreement, specifies a Washington forum.[6] The other, a shareholder agreement, sets jurisdiction in the English courts, governed by English law.[7]

Although not specifically mentioned in the complaint, the parties also entered into a

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[4] *See* Microsoft OEM Embedded Operating Systems License Agreement For Reference Platform Devices, dated April 1, 2001, at ¶ 16a (Poth Decl., Ex. C) ("This Agreement shall be construed and controlled by the laws of the State of Washington, and COMPANY [Sendo International, Ltd.] further consents to *exclusive jurisdiction and venue in the federal courts sitting in King County, Washington,* unless no federal subject matter jurisdiction exists, in which case COMPANY consents to exclusive jurisdiction and venue in the Superior Court of King County, Washington.") (emphasis added); License Agreement for Time-Sensitive Prerelease Software, dated August 23, 2002, at ¶ 8.2 (Poth Decl., Ex. G) (same).

[5] *See* US$14,000,000 Credit Facility Term Credit Agreement dated February 11, 2002, at § 9.12 (Poth Decl., Ex. F) ("Borrower [Sendo Holdings, PLC] hereby submits to the nonexclusive jurisdiction of the United States District Court for the Western District of Washington and of any Washington State court sitting in the King County for purposes of all legal proceedings arising out of or relating to this Agreement, the other Loan Documents or the transactions contemplated hereby or thereby.").

[6] *See* Microsoft Corporation Non-Disclosure Agreement (Standard Reciprocal) dated October 20, 1999, at ¶ 4(g) (Poth Decl., Ex. A) ("This Agreement shall be construed and controlled by the laws of the State of Washington, and both parties further consent to jurisdiction by the state and federal courts sitting in the State of Washington.").

[7] *See* Shareholders' Agreement dated May 24, 2001, at ¶ 23.1 (Poth Decl., Ex. D) ("The courts of England have exclusive jurisdiction to settle any dispute arising from or connected with this Agreement (a '**Dispute**')." (emphasis in original)). In conjunction with the Shareholders' Agreement, the parties also entered into a Subscription Agreement dated May 24, 2001, which at ¶11.2 similarly provides for exclusive jurisdiction in the courts of

July 12, 2001 agreement under which Microsoft licensed some programming source code from Sendo, Ltd. and Sendo International, Ltd. While silent as to forum, it arose "[u]nder the terms of" the SDMA and "[i]n furtherance of the mutual objections and undertakings as set out in the SDMA." The exclusive Washington forum selection clause of the SDMA should therefore be deemed to apply. (Poth Decl., Ex. E, p. 1 at (A) and (B).)

Finally, Sendo entered into several minor end user licensing agreements, all providing for jurisdiction in Washington, under which it acquired the development tools it needed to develop the Z100 Smartphone. These too provided for litigation in Washington.[8]

C. The Eastern District Of Texas Has No Connection To This Dispute.

Plaintiffs assert that Sendo America, Inc. ("Sendo America") is a Delaware corporation with its principal place of business in Texas. (Complaint at ¶ 3.) However, Sendo America's offices are in the Dallas suburb of Irving, in the Northern District of Texas,[9] and plaintiffs allege no facts to link either the parties or this dispute to this district.

As the declarations of Ian Ferrell ("Ferrell Decl.") and Marc Brown ("Brown Decl.") make clear, this case is not connected to this district at all. No meetings between the parties took place in this district. (Ferrell Decl. at ¶¶ 4-9; Brown Decl. at ¶¶ 6-7.)[10] Microsoft did not

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England. (Poth Decl., Ex. I.) By suing in Texas, plaintiffs have waived these provisions.

[8] *See, e.g.*, End-User License Agreement for Microsoft Software WAP Provisioning XML Generator for Smartphone 2002, dated August 2, 2002, at ¶ 8 (Poth Decl., Ex. H) ("This Agreement shall be construed and controlled by the laws of the State of Washington, and Recipient [Sendo, Ltd.] consents to the jurisdiction and venue in the federal courts sitting in King County, Washington, unless no federal subject matter jurisdiction exists, in which case Recipient consents to the jurisdiction and venue in the Superior Court of King County, Washington.").

[9] According to the information that it provides on its Web site, Sendo America's Texas offices are located in Irving, Texas, which does not fall within this District. *See* http://www.sendo.com/contactus/contactus.asp (last visited Jan. 30, 2003).

[10] One meeting took place in Dallas, outside this judicial district, when representatives of both Microsoft and Sendo traveled to meet with Texas Instruments ("TI"). Microsoft went to discuss whether Microsoft software would be able to run on computer chips TI was developing for use in cellular telephones, and the two Sendo representatives were present and made a short presentation to TI on their company. (Ferrell Decl. at ¶ 9.) However, the meeting, which is not mentioned in the complaint, was tangential to the parties' relationship and does not form the basis of any of plaintiffs' claims against defendants.

develop the relevant "Stinger" software in this district, and Sendo did not develop the Z100 Smartphone in this district. (Ferrell Decl. at ¶¶ 3, 8.) MCC's financing of Sendo Holdings PLC had no connection to this district. (Brown Decl. at ¶ 9.) Nor did the Sendo Holdings PLC Board of Directors, of which Marc Brown became a member. (Brown Decl. at ¶ 5.)

Finally, Sendo America is not a party to *any* of the contracts between the parties (Poth Decl., Exs. A to I) In summary, plaintiffs do not allege that anything relevant to this dispute occurred in this district. The case should be transferred to the district that is indisputably implicated – the Western District of Washington.

D. The Western District Of Washington Is Intimately Connected To The Parties' Dispute.

Unlike this district, King County, Washington is inextricably linked to the parties and the facts and circumstances underlying the complaint. Microsoft is headquartered there, and Microsoft's negotiation of the SDMA, as well as the overall business relationship with plaintiffs, was managed by Microsoft employees there. (Ferrell Decl. at ¶¶ 1-3; Brown Decl. at ¶¶ 6-10.) Nearly all business decisions were made in Washington, nearly all of the key witnesses are in Washington, and nearly all of the relevant documents are kept in Washington. (Ferrell Decl. at ¶ 10; Brown Decl. at ¶ 10.)

In addition, many of Sendo's own actions were closely linked to Washington. For example, Sendo attended several face-to-face meetings with Microsoft representatives in Washington. Sendo's founders, Hugh Brogan and Howard Lewis, came to Washington for these meetings. (Ferrell Decl. at ¶ 4.) Three Sendo managers came to Washington in June 2001 for a two-day major project review. (*Id.*) Sendo sent engineers to Washington as well, one of whom spent several weeks in Washington on more than one occasion. (Ferrell Decl. at ¶ 5.)

III. ARGUMENT: THIS CASE SHOULD BE TRANSFERRED TO WASHINGTON.

A. The Forum Selection Clause "Figures Centrally" Among The Factors Considered On A Motion To Transfer Under Section 1404(a).

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In determining whether to transfer a case under section 1404(a), the Court must balance two sets of interests: (1) the private interests of the litigants, and (2) the public interests in the fair and efficient administration of justice. *International Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 115 (5th Cir. 1996); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1389 (5th Cir. 1992). The Court exercises its discretion in light of the particular circumstances of each case. *See Robertson v. Kiamichi R.R. Co.*, 42 F. Supp. 2d 651, 655 (E.D. Tex. 1999).

Here, the SDMA forum selection clause permits litigation only in Washington. The Court begins its section 1404(a) analysis by examining the validity of the clause. *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078, 1086-87 (E.D. Tex. 2000) (Folsom, J.).[11] If it is valid, the clause, under *Stewart*, will "*figure[] centrally* in the district court's calculus." *Stewart*, 487 U.S. at 29 (emphasis added). As *Stewart* explained, "[t]he flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Id.* at 29-30. Indeed, Justice Kennedy, concurring in

[11] The Fifth Circuit has not decided whether the non-movant has the burden to demonstrate why the clause should not be enforced and the case transferred under section 1404(a). Two circuits have ruled on this issue, both holding that the non-movant has the burden, *see Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) ("plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum"); *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (*Stewart* case on remand) ("opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute"), and the majority of district courts that have considered the issue have reached the same conclusion, *see Outek Caribbean Distributors, Inc. v. Echo, Inc.*, 206 F. Supp. 2d 263, 266-67 (D.P.R. 2002), and cases cited therein. This Court has held, however, that the burden is with the party seeking transfer. *Brock*, 113 F. Supp. 2d at 1085. The facts of the present case satisfy either standard.

Stewart, urged that a valid forum selection clause be "given controlling weight *in all but the most exceptional cases*." *Stewart*, 487 U.S. at 33 (emphasis added).

In the present case, a valid forum selection clause sets exclusive jurisdiction in the Western District of Washington, and little deference is owed to the forum in which these foreign plaintiffs have chosen to sue. Moreover, both the public and private interests strongly weigh in favor of transfer. The Court should accordingly transfer this case.

B. The Washington Forum Selection Clauses Are Valid.

The Fifth Circuit has directed that forum selection clauses should be enforced as written unless clearly shown to be "unreasonable." *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Mitsui & Co. (USA) Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997) (same)); *accord International Software Systems*, 77 F.3d at 114-15 (*Bremen* applies in diversity case on motion to dismiss pursuant to forum selection clause). Under *Haynsworth*:

> Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

Haynsworth, 121 F.3d at 963 (quoting *Bremen*, 407 U.S. at 18; citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991)).

Here, plaintiffs allege no facts to support a conclusion that the forum selection clause resulted from fraud or overreaching. Such claims "must be *specific to a forum selection clause* in order to invalidate it." *Haynsworth*, 121 F.3d at 963 (emphasis added). "Allegations that the entire contract was procured as the result of fraud or overreaching are 'inapposite'" to a determination of the validity of a forum selection clause itself. *Afram Carriers, Inc. v.*

Moeykens, 145 F.3d 298, 301 (5th Cir. 1998) (quoting *Haynsworth*, 121 F.3d at 964); *see also MacPhail v. Oceaneering Int'l, Inc.*, 170 F. Supp. 2d 718, 724 (S.D. Tex. 2001) ("[A] court may consider a claim that a party was fraudulently induced to include a forum selection clause in an agreement, but may not entertain a claim that the entire agreement was procured by fraud."); *Brock*, 113 F. Supp. 2d at 1087 ("Plaintiffs' claims that they signed the franchise agreements under duress is insufficient to invalidate the forum-selection clauses, which themselves must be the result of fraud or coercion.") (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)).

Plaintiffs' general allusions to a "secret plan," or allegations that the forum selection clauses "were fraudulently induced by Microsoft through false representations and unconscionable conduct," (Complaint at ¶ 10), are plainly insufficient. As the Fifth Circuit has emphasized:

> Only when we can discern that *the clause itself* was obtained in contravention of the law will the federal courts disregard it and proceed to judge the merits. Because, in this case, we can draw an inference of an illegally obtained forum-selection clause only if we judge the merits of the contract – that is, the [parties opposing enforcement] have offered no evidence that the clause itself was obtained as a result of fraud or overreaching – we cannot disregard it on that ground.

Afram, 145 F.3d at 302; *see also Brock*, 113 F. Supp. 2d at 1087 (rejecting fraud challenge where "the Plaintiffs had, or at least should have had, sufficient notice of the forum-selection clause before they made significant outlays or incurred significant contractual obligations").

Further, there are no allegations that defendants exploited superior bargaining power or "coercion" to cause plaintiffs to agree to the clauses *or*, for that matter, the contracts as a whole. The "plaintiffs [are] sophisticated parties contracting voluntarily," *Haynsworth*, 121 F.3d at 965; indeed, Sendo is "made up of able and experienced former employees of such established mobile

phone manufacturers as Philips, Nokia and Motorola," the largest cellular telephone manufacturers in the world. (Complaint at ¶ 14.)

The second and third bases for "unreasonableness" in *Haynsworth* can be dismissed out of hand. Plaintiffs cannot contend that litigating this matter in the Western District of Washington would be so seriously inconvenient that it would, "for all practical purposes," deprive them of their day in court. Plaintiffs acknowledge that they are national and international companies with "substantial experience" in the "technology of mobile telephone handsets [and] their operating systems," engaged in significant "relationships" with major companies "such as Orange, Cingular and AT&T Wireless." (Complaint at ¶¶ 13-14.) They claim they were prepared, indeed entitled, to "go to market" with Microsoft, which is located in Washington. (Complaint at ¶¶ 14, 12-49.) Indeed, Sendo representatives often traveled to Washington in connection with the very relationship complained of. (Ferrell Decl. at ¶¶ 4-5.) There is not a single fact to suggest why a Washington forum would be at all inconvenient, let alone so severely inconvenient that it would effectively deprive plaintiffs of their day in court. Nor can plaintiffs claim any "fundamental unfairness of the chosen law," to which they agreed in arms'-length negotiation with defendants.

Finally, there is no conflict with a strong public policy of Texas, the forum state. Indeed, in *Haynsworth* the Fifth Circuit noted that "[p]ublic policy *weighs strongly in favor*" of enforcing forum selection clauses, particularly where, as here, a contract involves parties from two or more countries. *Haynsworth*, 121 F.3d at 962 (emphasis added).

The SDMA forum selection clause is thus valid and must "figure[] centrally" in the analysis under section 1404(a). As detailed below, a balance of the other factors on a transfer motion clearly weighs in favor of transfer as well.

C. The Factors Under Section 1404(a) Clearly Favor Transfer To The Western District Of Washington.

1. The Applicable Private Interests Favor Transfer.

The remaining factors related to private convenience consist of: (1) the plaintiff's choice of forum; (2) the convenience of parties and witnesses; (3) the relative ease of access to the sources of proof; (4) the relative costs of trial, including obtaining the attendance of witnesses; (5) the place of the alleged wrong; (6) the location of counsel; and (7) the possibility of delay and prejudice if a transfer is granted. *Brock*, 113 F. Supp. 2d at 1086; *see also In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 688 (E.D. Tex. 1999); *Robertson*, 42 F. Supp. 2d at 655. Each of these factors either favors transfer or is neutral as to which jurisdiction takes precedence. None favors Texas.

a. Plaintiffs' Choice Of Forum Deserves Little Or No Weight.

While a plaintiff's choice of forum ordinarily is "highly esteemed," *Triton*, 70 F. Supp. 2d at 688, that choice is accorded little or no weight when a foreign plaintiff disregards a valid forum selection clause, or sues in a district with no connection to the case. First, as the Supreme Court made clear in *Piper*:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper, 454 U.S. at 255-56. In *Empresa Lineas*, 955 F.2d at 373, the Fifth Circuit explained that "[c]onvenience is the ultimate consideration for a district court in balancing private interest factors, including the forum choice of the plaintiff." However, "[w]hen a plaintiff chooses a foreign forum for its claims, *courts are reluctant to assume that convenience motivated that choice*." *Id.* (emphasis added) (citation omitted). Here, of course, there can be no basis for such an assumption, since plaintiffs allege nothing convenient about this district. *See also Simcox v.*

McDermott Int'l, Inc., 152 F.R.D. 689, 694 (S.D. Tex. 1994) ("Although the court is mindful that the Simcoxes chose a Texas forum and that deference is generally given to the plaintiff's choice of forum, in this case, no substantial deference is due, as the Simcoxes are citizens of the United Kingdom, living in Wales, with absolutely no ties to the State of Texas."); *Neo Sack*, 810 F. Supp. at 833 ("a foreign plaintiff's selection of an American forum deserves less deference than an American citizen's selection of his home forum").

Second, as numerous courts have explained, deference to the plaintiff's choice "is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); *see also In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Shore Slurry Seal, Inc. v. CMI Corp.*, 964 F. Supp. 152, 156 (D.N.J. 1997) (valid forum selection clause "is treated as a manifestation of the parties' preferences as to a convenient forum.") (quoting *Jumara*, 55 F.3d at 880).[12]

Finally, plaintiffs allege no facts to connect their dispute to this district. In *In re Horseshoe Entertainment*, 305 F.3d 354 (5th Cir. 2002), the Fifth Circuit granted mandamus relief and ordered transfer under section 1404(a) where the plaintiff, who sued in the Middle District of Louisiana, failed to allege that any operative facts had occurred there. As the court observed:

> The plaintiff did not allege that "any unlawful employment practice" was committed in the Middle District of Louisiana; there is nothing in this record to indicate that relevant employment records were maintained or administered in the Middle District of Louisiana; there is nothing in this record to indicate that the plaintiff "would have worked" for Horseshoe in the Middle District of Louisiana but for the alleged unlawful employment practice and there is nothing in this record to indicate that Horseshoe had any office of any kind in the Middle District

[12] *See also Outek Caribbean*, 206 F. Supp. 2d at 266; *Knudsen v. Elite Trading Group, Inc.*, No. CV-99-1497-HU, 2000 WL 488481, at *5 (D. Or. Mar. 17, 2000); *Strategic Marketing & Communications Inc. v. Kmart Corp.*, 41 F. Supp. 2d 268, 273 (S.D.N.Y. 1998); *Micro-Assist, Inc. v. Cherry Communications, Inc.*, 961 F. Supp. 462, 465 (E.D.N.Y. 1997); *Nemo Associates, Inc. v. Homeowners Marketing Services Int'l, Inc.*, 942 F. Supp. 1025, 1028 (E.D. Pa. 1996); *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992).

of Louisiana.

Id. at 359. Plaintiffs here do no better than in *Horseshoe*. *See also Creaciones Maternales de Mexico, S.A. v. Kiddie Prods. Inc.*, No. 94 Civ. 8007 (JFK), 1995 WL 617188, at *1 (S.D.N.Y. Oct. 20, 1995) (granting transfer motion where "[a]side from the existence of the alleged showroom and the single luncheon meeting the Complaint alleges no other connection to this New York forum").

Even in the absence of a forum selection clause, these plaintiffs' choice of this district would be accorded little weight. With the forum selection clause added, along with the absence of any factual nexus to this district, the case for transfer is compelling.

b. The Efficiency Factors – (A) Convenience Of Parties And Witnesses, (B) Access To Sources Of Proof, (C) Location Of Counsel, and (D) Costs Of Trial – All Weigh In Favor Of Transfer.

Proceeding in the Western District of Washington would be more efficient than the Eastern District of Texas. First, it would obviously be far less burdensome to defendants to proceed in Washington, where virtually all of the witnesses and most of the documents are located. But in addition, it would certainly be at least as convenient for Sendo to litigate in Washington as in Texas. Plaintiffs have alleged nothing to link this case, or themselves, to this judicial district. Sendo witnesses will need to travel from England to the United States for trial, and there is every reason to suppose that it would be as convenient for them to travel to Washington as to Texas. Indeed, they frequently traveled to King County, Washington – which is served by a major international airport in Seattle, to which non-stop flights from London are available – without complaint during the period of the Z100 project. (Ferrell Decl. at ¶¶ 4-6.) *See Higgins v. Amazon.com, Inc.*, No. 02Civ.1604RMBFM, 2002 WL 31760237, at *4 (S.D.N.Y. Dec. 9, 2002) ("The transfer of this action to Washington, where Amazon is located, obviously would minimize the burden that responding to this action imposes upon Amazon.

Lloyd's, on the other hand, is a British entity which will suffer some degree of inconvenience no matter where in the United States its claims are heard.").

c. The Preference To Proceed In The "Place Of The Alleged Wrong" Weighs In Favor Of Transfer To Washington.

The only American venue that could be deemed the "place of the alleged wrong" is the Western District of Washington. To the extent that the Court gives preference to the forum where the "wrong" occurred, transfer is appropriate.

d. No Possibility Of Delay Or Prejudice Weighs Against Transfer.

Where, as here, the motion is brought at the inception of a case, before discovery has begun, there is no potential for delay or prejudice weighing against transfer.

2. The Applicable Public Interest Factors Favor Transfer.

The public interest factors relevant to the Court's determination under section 1404(a) include: (1) court congestion; (2) local interest in the dispute; (3) the fairness of placing the burdens of jury duty on the citizens of the state with the greater interest in the dispute; and (4) the appropriateness of having the case in the jurisdiction whose law will govern the dispute, thus avoiding potential problems in conflict of laws. *Brock*, 113 F. Supp. 2d at 1090; *see also Triton*, 70 F. Supp. 2d at 688; *Robertson*, 42 F. Supp. 2d at 655. All of these factors weigh in favor of transfer.

The citizens of the Eastern District of Texas have no "local interest" in this dispute. No citizen of this district has any connection to the relationship or dispute, and it would be unfair to burden them with this case. The Western District of Washington has a much greater interest in this dispute, and it is only reasonable that the Washington federal court and the citizens it serves should bear the burden of resolving it.

Finally, the Western District of Washington is a more appropriate forum because under the SDMA (as well as several other contracts), Washington law governs this dispute. In *Gulf Oil*

Corp. v. Gilbert, 330 U.S. 501, 509 (1947), the Supreme Court explained that it is appropriate to have "the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." As the court in *D.W. Higgins*, 2002 WL 31760237, at *5, succinctly put it when recently granting a transfer motion, "[s]uffice it to say, the federal courts in Washington will have far greater knowledge of Washington law than this Court."

In contrast, none of the agreements between the parties involves the application of Texas law. This factor also weighs strongly in favor of transfer.

IV. CONCLUSION

For the foregoing reasons, the Court should transfer this case to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

By: _____
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Dated: February 3, 2003

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CERTIFICATE OF SERVICE
PURSUANT TO LOCAL RULE CV-5(e)

I hereby certify that a true and correct copy of the above and foregoing document has been provided to all known counsel of record as indicated below, on the 3rd day of February, 2003.

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Damon Young

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), the undersigned has conferred with opposing counsel, George McWilliams, in a good faith effort to resolve the issues presented in the foregoing motion without court intervention and has been advised that the relief requested is opposed.

Damon Young